

Application No. 10/719,369
Amendment dated March 13, 2009
Reply to Final Office action of January 16, 2009

REMARKS / ARGUMENTS

Summary of Claims Pending

Claims 17-21, 23 and 25, 26, 28 and 30 are now pending.

Double Patenting Rejections

The pending claims are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-33 of co-pending Application No. 11137831 (filed May 24, 2005).

According to MPEP § 804, “If a ‘provisional’ nonstatutory obviousness-type double patenting (ODP) rejection is the only rejection remaining in the earlier filed of the two pending applications, while the later-filed application is rejectable on other grounds, the examiner should withdraw that rejection and permit the earlier-filed application to issue as a patent without a terminal disclaimer.”

It should be noted that the present application is the earlier filed of the two pending applications. It is further noted that the provisional obviousness-type double patenting rejection is the only rejection remaining in this (the earlier filed) application, and that this application should be permitted to issue as a patent without a terminal disclaimer. This is apparently the outcome mandated by MPEP § 804. The examiner is apparently ignoring the Office’s policy as set forth in the MPEP.

It is further noted that the patent that will soon grant from 11137831 will apparently expire on September 2, 2025 (in view of PTA to date) whereas a patent from the present application will apparently expire on 11/21/2023 (without consideration of possible PTA). Accordingly, it appears that a patent from the present application will expire before the patent that will grant from 11137831. If so, a terminal disclaimer against 11137831 will have no effect.

Moreover, it should be noted that the ODP rejection made in this application was brought to the attention of the examiner in 11137831 in an Amendment After Final filed on October 29,

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2008. It was urged that in view of claim amendments made in 11137831 there is no basis for an ODP rejection. Indeed, the examiner in 11137831 failed to make such rejection. It is accordingly suggested that a basis for an ODP rejection does not, in fact, exist.

In short, it is believed that it is entirely improper for the examiner to persist in making the present provisional ODP rejection and in refusing to pass the case to allowance without the submission of a terminal disclaimer against 11137831.

Nevertheless, in the interest in advancing prosecution a terminal disclaimer with respect to 11137831 is submitted herewith. The examiner has indicated a timely filed terminal disclaimer with respect to 11137831 would obviate the ODP rejection. Thus, there is apparently no remaining reason for the examiner to fail to allow this application.

Respectfully submitted,

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